CNJ RAIL CORPORATION

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September 29, 2014

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ENTERED
Office of Proceedings
September 30, 2014
Part of
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US Surface Transportation Board
Office of Proceedings

Chief – Section of Administration
395 E Street SW
Washington, DC 07302

Re: STB Docket # **FD 35496**
Denver & Rio Grande Railway Historical Foundation
Petition for a Declaratory Order

Pleading
Request for a extension of time.

Dear Ms. Brown,

I am transmitting to you today my formal **Notice of Intent To Participate** (with Comments) as a party of record in the above referenced proceeding.

On September 8th, 2014, the Denver & Rio Grande Railway Historical Foundation ("Foundation") filed a Petition for Reconsideration of a previous Board decision. In their petition the Foundation stated they believed I would be filing a Verified Statement in support of their petition. Pursuant to applicable STB regulations, that reply would have been due today.

Two recent events, all beyond the control of the undersigned, have produced a circumstance which has delayed completion of the Verified Statement. Last Tuesday, Sept 22nd, 2014, the Shank family lost their beloved mother[1], who passed away. As a result, both the Foundation's executive director, Donald Shank and his brother, Robert had been understandably preoccupied with unfortunate obligations of having to make appropriate funeral arrangements last week. Subsequently, key Foundation personnel

[1] See a copy of the obituary of Dorothy Shank, published in the Durango Herald, hereto attached.

were unavailable to reproduce and transmit to me the documents needed to timely complete my Verified Statement. Since my Notice of Intent did not require access to documents in order to timely complete it, it is being timely transmitted to you today.

In addition, last week, CNJ Rail Corporation was bombarded with additional discovery requests, including extraordinarily time sensitive requests stemming from our involvement in STB Docket # AB 167 (Sub No.# 1189) X. We believe copies of the additional requests were attached as exhibits to the City of Jersey City's motion for clarification filed which was filed Thursday of last week. CNJ is being pressed to produce documents quickly in order to address issues related to New Jersey's Open Public Records Act.

As a result of these two events, the undersigned has been both unable to receive the necessary documents he needs to complete his statement due to the sorrowful circumstances surrounding the unfortunate passing of a beloved relative of key Foundation personnel and, has had his time simultaneously burdened by the need to immediately address document production requests in another unrelated STB proceeding.

Document production requests should be able to be completed by the end of this week. However, Foundation personnel are not expected to be available until October 14th at the earliest. Funeral services, and internment are scheduled for this week but Foundation members will be subsequently unavailable until Oct 14th due to previous commitments requiring travel outside of the United States.

Wherefore, the undersigned respectfully requests an extension of time to file his Verified Statement until Monday, October, 20th 2014.

Respectfully,

Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation

Direct Line: (908) 361 – 2435

Email: E.Strohmeyer@CNJRail.com
Email: CNJRail@yahoo.com

Cc: Mr. John Heffner, Esq.
Mr. Eugene Farrish, Esq.

Article published Sep 23, 2014

Dorothy Shank

Photo by:
Shank

Durango resident Dorothy Shank died Monday, Sept. 22, 2014, at Sunshine Gardens Country Home. She was 92.

Mrs. Shank was born to Lila Willey and Walter F. Quale on Jan. 18, 1922, in Omaha, Nebraska. An honors graduate of North High School in Omaha, she went on to study nursing at the University of Nebraska.

She moved to Chicago, where Mrs. Shank met and married the man her family called the "love of her life," Bob Shank, on Jan. 30, 1943.

They immediately moved to Los Angeles, where Mr. Shank went to work in the aircraft industry upon his college graduation.

Mr. and Mrs. Shank moved to Durango in 1975, but they had started vacationing here in 1950. The family fondly remembers early train rides, crossing Wolf Creek Pass before it was paved, lots of off-roading and hiking in the mountains.

"Dorothy's greatest joy was her family," according to her family. "As the heart of a close-knit family, she was adored by everyone."

While living in California, she studied education at San Fernando Valley State College and served on the Board of Deacons and Session of Encino Presbyterian Church, where the family was active for more than 40 years. She joined the P.E.O. Sisterhood in 1972 in California and moved her membership to Chapter FX in Durango.

An avid quilter, she was a charter member of the La Plata Quilters Guild. She also enjoyed sewing, attending church with the family and gardening. Her children often referred to her as "Mother Nature," they said.

Mrs. Shank volunteered as a coordinator for Meals on Wheels and tutored nursing students

at Fort Lewis College.

"She especially loved Durango in the fall with its resplendent colors," according to her family.

Mrs. Shank was preceded in death by her husband of 65 years, Bob Shank; and granddaughter Krystin Shank.

She is survived by her children Margien Gram, of Durango, Bob Shank, of Monte Vista, and Don Shank, of South Fork; four grandchildren; and 10 great-grandchildren.

Cremation will occur. A memorial service, burial in the Columbarium and reception will be held at 10 a.m. Tuesday, Sept. 30, 2014, at the First United Methodist Church of Durango, 2917 Aspen Drive.

Before the

SURFACE TRANSPORTATION BOARD

FD # 35496

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

d/b/a

DENVER & RIO GRANDE RAILROAD

PETITION FOR A DECLARATORY ORDER

ERIC S. STROHMEYER

NOTICE OF INTENT TO PARTICIPATE

With

COMMENTS

Respectfully Submitted,

Eric S. Strohmeyer
Director – Rail Freight Services
Denver & Rio Grande Railroad

c/o CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

Dated: September 2nd, 2014

FD 35496

PETITION FOR A DECLARATORY ORDER

NOTICE OF INTENT TO PARTICIPATE

With

COMMENTS

Pursuant to the applicable regulations of the US Surface Transportation Board ("Board"), the undersigned respectfully submits his formal Notice of Intent to Participate as a **party of record** in the above entitled proceeding. In addition to holding a position within the Denver & Rio Grande Railway Historical Foundation ("Foundation"), the undersigned will also participate in this proceeding in his individual capacity.

Parties are respectfully directed to serve copies of all pleadings upon the undersigned at the address provided herein below:

Mr. Eric S. Strohmeyer
Director – Rail Freight Services
Denver & Rio Grande Railroad

c/o CNJ RAIL CORPORATION
81 Century Lane
Watchung, NJ 07069

Tel: (908) 361 - 2435
Email: E.Strohmeyer@CNJRail.com
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BACKGROUND

The facts of the case have already been well established in this proceeding. For the purposes of framing the comments contained herein below, the following brief synopsis is provided.

In 2000, the Foundation acquired approximately 20 miles of line of railroad from the Union Pacific Railroad ("UP") pursuant to the Board's Offer of Financial Assistance ("OFA") procedures. With the consummation of the acquisition of the line from UP, the Foundation

became a Class III short line railroad subject to the Board's exclusive jurisdiction. In 2003, the Foundation leased certain parcels of land, complete with buildings, in the City of Monte Vista, CO ("City") and established a maintenance facility to support operations on their nearby rail line.

On or about 2008-2009, the City introduced a **zoning ordinance** which attempts to restrict the storage of railcars within certain sections of the City if those railcars are not on rails sidings connected to the national rail system. Shortly after passing the ordinance, the City began certain actions seeking enforcement of the ordinance against the Foundation. The City prevailed in getting a local municipal court to enter an order enforcing the ordinance. However, the Foundation appealed the decision. The appellate court stayed the enforcement action and permitted the Foundation to refer the question of Federal preemption to this Board.

On August 18th, 2014, the Board issued a decision which found that the Foundation was a Class III rail carrier, but despite evidence in the record, and while giving contradictory statements, and while failing to provide appropriate explanation, the Board found that certain activities on the disputed parcel were not "transportation" subject to the Board's exclusive jurisdiction. The Board then stated its decision might change in the future.

On September 8th, 2014, the Foundation asked this Board to reconsider its decision. The Foundation demonstrated the clear material error in the Board's decision. It also submitted new substantial new evidence into the record.

ARGUMENT

This case in many ways is virtually identical to a case recently adjudicated before the D.C. Circuit Court of Appeals. In *Riffin v. STB* 592 F3 195, 198 (D.C. Cir. 2010) ("*Riffin*"), the Court vacated this Board's decision and remanded the case back to the agency for further proceedings. The facts in that case were virtually identical to the facts in this current proceeding. Before addressing issues regarding potential conflicts[1] with previously adjudicated proceedings, the undersigned would first like to address a point which appears to the thrust of the City of Monte Vista's: That the Foundation failed to establish a "nexus" between the disputed use of the Foundation's property and interstate commerce.

An appropriate "nexus" has been clearly established

In their alleged "joint" reply, the City of Monte Vista, *et al*, while acknowledging the Foundations common carrier obligation, appears to take a position that a "nexus" has somehow not been shown to exist between the Foundation's use of the property and its operations of its Board-regulated rail line. That couldn't be further from the truth. The Monte Vista facility is used as its maintenance facility. A rail carrier's maintenance facilities are clearly subject to this Board's exclusive jurisdiction.

[1] In the event this agency should elect not to reconsider its decision, the undersigned wishes to retain his individual right to seek judicial review for the reasons outlined in these comments.

This Board's decision does nothing to resolve the controversy it was asked to resolve. In one sentence, the Board appears to acknowledge that the Foundation's use of the property may trigger the agency's exclusive jurisdiction. **The Board ignores evidence in the record directly related to maintenance activities on the site.** It then finds "activities on the site are not 'transportation', and then bizarrely sites easily distinguishable cases that have absolutely no bearing or relevance to facts of case. The decision further "muddies the water" by indicating things could change "in the future" which might cause the Board to reverse its position.

It's the Board's failure to adequately explain its bizarre conclusion that causes its decision to be so suspect and call into question its motives. It appears that this case is nothing more than a thinly veiled attempt by this agency to circumnavigate a number of adverse decisions previously rendered against it by the courts, including binding decisions of the US Supreme Court.

The first problem is the Board's failure to adequately explain its decision. In *New York Cross Harbor RR v. STB* 374 F.3d. 1177 (D.C. Cir. 2004) ("*Cross Harbor*"), this Board's decision was vacated in part for **ignoring certain evidence in the record**, failing to apply its precedent properly, and most importantly, failing to adequately explain its reasoning for departing from its precedent. Such is the case in this proceeding as well.

The next significant problem the agency's decision faces is that the effect of the decision effectively denies the Foundation use of its facility while yet another proceeding is needed to in order to resolve the controversy. In addition, the effect of the Board's decision appears to directly challenge a mandate of the US Supreme Court.

In *Riffin*, the D.C. Circuit relied heavily upon the Supreme Court's decision in *Pike v. Bruce Church* 397 US 137, 145-146, 90 S.Ct. 844, 849 (1970) ("*Pike*") in reversing the Board.

The *Pike* decision bears heavily in this proceeding as well. On more than one occasion, both the City of Monte Vista and its erstwhile allies, the SLRG, have argued that the Monte Vista facility has no relationship to the Foundation's line by virtue of the fact that it sits 30 miles away from the Foundation's rail line. This Board's decision clearly attempts to strip the Foundation's preemption argument on that basis as well. As both Supreme Court, and the D.C. Circuit have held, that violates the Commerce Clause and unduly restricts interstate commerce.

For the benefit of the Board, the undersigned will briefly highlight elements of the Supreme Court's decision in *Pike*.

In Pike, Church began growing cantaloupes in Parker, Arizona. A 1926 Arizona statute required all Arizona-grown cantaloupes be packed in Arizona. Church had existing packing facilities in Blythe, California, 31 miles west of Parker. It would have cost Church $200,000 to build a packing facility in Parker. The Supreme Court held that dictating how an interstate

commerce entity allocates its interstate resources, unduly burdens interstate commerce, in violation of the Commerce Clause.

Foundation presently has its maintenance-of-way facility in Monte Vista, CO. It would cost the Foundation several hundred thousand Dollars to build a second maintenance-of-way facility adjacent to its line of railroad in Mineral County, Colorado. This is similar to Church's dilemma: Church had an existing packing facility in Blythe, California. Arizona said that if Church wanted to grow cantaloupes in Arizona, it had to build a second packing plant in Arizona. The Supreme Court held that dictating how an interstate entity allocates its interstate resources unduly burdens interstate commerce, in violation of the Commerce Clause.

In the proceeding before this Board, the Monte Vista has argued that for a rail carrier facility to be subject to the STB's jurisdiction, it must be adjacent to the rail carrier's line of railroad. In effect, the City is clearly attempting to dictate how a rail carrier allocates its interstate resources. If the rail carrier locates its interstate resources adjacent to its rail line, then the facility will receive the benefits associated with being subject to the STB's exclusive jurisdiction, such as preemption from State and local regulation. If the rail carrier does not locate its interstate resources adjacent to its line of railroad, then the rail carrier will lose its STB-jurisdiction benefits.

The undersigned respectfully argues the Supreme Court has held that any restrictions placed on where an interstate entity allocates its interstate resources, unduly burdens interstate commerce, and thus is prohibited by the Commerce Clause.

For the benefit of those parties unfamiliar with the case, the pertinent portions of the Pike decision are reproduced below:

> "But in Toomer v. Witsell, supra, [334 U.S. 385], the Court indicated that such a burden upon interstate commerce is unconstitutional. ... What we said there [in Toomer] applies to this case as well:
>
> "There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. ... The necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry."
>
> "While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources."
>
> 397 U.S. 145-146, 90 S.Ct. 849.

In this proceeding, there is ample **undisputed evidence** of appropriate Board sanctioned maintenance activities having long occurred (in the past), continuing to occur (the present), and there are no plans to relocate its facility any time soon (the future). Like in *Cross Harbor*, the Board ignored that evidence which inconveniently gets in the way of the decision it wanted to make. That is the very essence of being arbitrary and capricious. Maintenance is clearly an essential part of rail carrier's operations. Where those facilities are placed is clearly at the discretion of the carrier.

The fact that the Foundation runs a tourist train is irrelevant to the Board's analysis. Lots of common carrier railroads run tourist trains to supplement revenues from their common carrier operations. The Foundation reinvests any earned proceeds from those tourist trains into the track and other assets needed to meet its continuing (and undisputed) common carrier obligation. Maintenance of the track and equipment which must be maintained in order for a carrier to meet its common carrier obligation is without a doubt part of "transportation" as it has long been interpreted by this agency. The Board's decision fails miserably to explain why it departure from its long standing precedent is warranted.

Potential for Conflict between the Circuits

The Board's decision in this matter was truly baffling to the undersigned. This case is virtually identical to a case recently adjudicated before the D.C. Circuit in *Riffin.* Many of the facts in that case were virtually identical to the facts in this current proceeding.

The Foundation has already indicated it would consider seeking judicial review in the 10th Circuit Court of Appeals. No party can ever pre-determine the outcome of a judicial review proceeding. However, it can be reasonably determined that one *possible* outcome might be that the 10th Circuit disagrees with the conclusion of D.C. Circuit. If that were to occur, the result might produce a conflict within the Circuits.

In the event this agency should elect not to reconsider its decision, the undersigned wishes to retain his own individual right to seek judicial review, including, but not limited to, the right to file a *Writ of Certiorari* with the US Supreme Court in the event of a conflict between the Circuit Courts.

It should be noted again that in *Riffin*, the seminal case in which the D.C. Circuit appeared to have relied upon was the US Supreme Court's decision in *Pike.* The Board does not regulate where a carrier places its interstate facilities. In *Riffin*, the Court noted the proximity of the maintenance site to the carrier's rail line, and it was noted that a 150 mile haul **by highway via motor carrier** was not unreasonable. Monte Vista sits but a mere 30 miles away via highway, which is even closer that the facts in *Riffin*. The Foundation's Monte Vista facility is the exact same distance away from its line as the two facilities were in *Pike* case.

In addition, the Board elected to render a decision on the issue of "transportation related activities" on the site while ignoring evidence of transportation, and failing to adequately explain its reasoning and properly distinguishing its precedent.

CONCLUSION

For all of the above going reasons, the undersigned respectfully files this Notice of Intent to Participate in the above captioned proceeding. I respectfully submit the comments herein above as testament to my position in this proceeding.

Respectfully submitted,

Eric S. Strohmeyer

Dated: September 29th, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2014, I served via both first class mail, postage prepaid, and via electronic mail, a copy of my **Notice of Intent to Participate** as a Party of Record and a **Request for an Extension of Time** on upon the following:

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